Chapter Five:

Study Summary and Findings

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Passive alcohol sensors are designed to provide a qualitative, not quantitative assessment, of the presence of alcohol. According to the literature, passive alcohol sensors are intended to serve as a useful indicator of the presence of alcohol in the air within the motor vehicle to assist an officer during a traffic stop. However, unlike an evidential or a preliminary breath test, a passive alcohol sensor cannot be used to measure how much alcohol a person has consumed, and the results from a passive alcohol sensor cannot be used as evidence in court.

At this time, the State Patrol Chemical Test Section does not recommend the use of passive alcohol sensors for traffic enforcement in Wisconsin. Passive alcohol sensor testing conducted in 1994 and preliminary testing conducted in relation to this study have not provided results that would lead the Chemical Test Section to recommend any of the tested devices. Therefore, passive alcohol sensors that are used in WI are not supported by the Chemical Test Section meaning any evaluation, calibration, accuracy checks, maintenance, repair, operator training or certification is the responsibility of the agency choosing to use a passive alcohol sensor for purposes of traffic enforcement.

Six companies nationwide currently manufacture passive alcohol sensor devices at costs typically ranging between $300 and $700. Given that the relative price of preliminary breath test (PBT) technology is similar to that of passive alcohol sensors, and because a PBT can make an initial quantitative measurement of the amount of alcohol that is consumed by a person, some law enforcement agencies may choose to use a PBT device instead of a passive alcohol sensor for OWI traffic stops. However, it is important to note that there may be some situations in which the law enforcement officer may prefer to passively sense the presence of alcohol (e.g., as part of a crash investigation involving an unconscious individual).

Passive alcohol sensors are manufactured in many different shapes and sizes. Some passive alcohol sensor devices can sense the presence of alcohol without the subject/driver being aware that they are actually being "sensed." This type of sensor is seen by some as being "covert." Law enforcement officers have used this type of enforcement effort for teen parties or at large events where alcohol can be problematic. However, as discussed in Chapter Two, privacy concerns have been raised by the public, law enforcement, and the legal community regarding the use of these covert-type style devices.

Passive alcohol sensors are designed to supplement a law enforcement officer's natural senses. Passive alcohol sensors can assist an officer who is experiencing problems with distinguishing between different odors in the environment (e.g., car exhaust, cigarette smoke, breath mints used by subjects to cover up alcohol) or who may have a temporary or medical condition that interferes with an officer's ability to detect alcohol.

Passive Alcohol sensors have been used in the past in Wisconsin to help confirm an officer's suspicions that a person has been drinking, as a tool to help change drinking and driving behavior, to assist in crash investigations, and to help enforce absolute sobriety laws involving juveniles, repeat drunk drivers, and commercial truck drivers.

Passive alcohol sensors, however, cannot be used to determine if a driver is impaired. Again, passive alcohol sensors present only a qualitative indication that a person may have been drinking. The determination of whether a person is impaired depends upon standard sobriety testing, which includes the law enforcement officer's individual professional judgment, as well as field sobriety tests and evidential testing (e.g., Intoximeter EC/IR).

Passive alcohol sensors have the capability of protecting an officer from inhaling odors, drugs and other harmful chemicals that may be present at a traffic stop. Officers are sometimes exposed to other chemicals and fumes which are unknown to the officer. A passive alcohol sensor is designed to detect alcohol to help minimize the risks to the officer.

Passive alcohol sensors have also been used for situations beyond traffic enforcement. In addition to traffic enforcement, passive alcohol sensors have been used in schools and the workplace to help identify drinking and to support zero tolerance policies as well as to evaluate commercial drivers, railroad engineers, airline pilots and commercial boat operators

In the absence of a U.S. Supreme Court or State Supreme Court decision testing the constitutionality of passive alcohol sensors this study concludes that the use of passive alcohol sensors for traffic enforcement does not conflict with the well established guidelines and procedures governed by the Fourth Amendment to the U.S. Constitution, including the principles of probable cause and reasonable suspicion. If passive alcohol sensors are used by law enforcement in accordance with proper legal procedures, individual privacy rights will not be violated. This finding is based on the legal tests and constitutional principles that have been applied in this study that are consistent with previous opinions by the courts.

Although the use of passive alcohol sensors does not appear to conflict with the provisions and exceptions of the Fourth Amendment to the U.S. Constitution, concerns about "the erosion of privacy rights" still remain. "Safeguarding the public's right to privacy" was a commonly held concern that was shared by the legal and law enforcement focus groups as well as by the public (refer to the Omnibus Survey). Both focus groups emphasized the need to follow correct search and seizure procedures, including the need to have reasonable suspicion and probable cause before any testing of a suspected impaired driver could take place. With respect to covert uses of passive alcohol sensor devices, several focus group members from both groups, including attorneys and law enforcement officers, were also concerned about the public perception and correct use of the devices. It was suggested that if covert-

style devices were to be used, a set of law enforcement agency policies must be put in place requiring notification to the driver that a passive alcohol sensor is being used. There was a particular concern among several members of the law enforcement focus group that promoting the public's trust in law enforcement is an important element for the law enforcement community

Several members of the legal focus group and the law enforcement focus group suggested that passive alcohol sensors should not be banned entirely. Although many focus group participants questioned the cost effectiveness and the usefulness of passive alcohol sensors in obtaining convictions, many also suggested that the decision to use these devices should be left to each individual law enforcement agency because there may be particular situations unique to each community that may warrant their use.

In addition, several members of the legal and law enforcement focus group indicated that if passive alcohol sensors were permitted, that it would be prudent and necessary to have policies in place to guide their use. These policies include: requirements for training for law enforcement officers on legal issues and operational techniques for using and maintaining the devices, notification to the driver/subject that the passive alcohol sensor is going to be used to obtain a sample of the driver's breath, and agency guidelines on the conditions that permit the use of the devices. It was also suggested by one member of the law enforcement focus group that the state legislature consider legislation requiring a trial phase during which a selected number of law enforcement agencies test the device and collect data on its accuracy and effectiveness for use in subsequent discussion on the devices.

The results of the laboratory analysis indicate the need for caution when considering whether to employ a passive alcohol sensor in law enforcement situations. Performance of passive alcohol sensors varies and, even under laboratory conditions, they did not approach the dependability experienced through the use of breath alcohol testing devices already approved for use in Wisconsin. Law enforcement agencies and communities considering use of a passive alcohol sensor need to be aware of the limitations of the device and be prepared to conduct additional evaluations to clearly define the field situations in which they are reliable.

Based on previous national studies from laboratory tests, passive alcohol sensors have been shown to be more sensitive to higher breath alcohol concentration than to lower breath alcohol concentrations. National studies of passive alcohol sensor instruments under laboratory conditions reveal that alcohol can be effectively detected at least 75% of the time for BACs of 0.08. Also, it was found that "accuracy" of the device also depends on the distance between the instrument and the subject's mouth, which averaged between 5 and 8 inches.

"Effectiveness" is a subjective term because its meaning varies from one law enforcement agency or officer to another. According to representatives of the law enforcement community and the literature, "effectiveness" of passive alcohol

sensors varies depending upon the unique circumstances that they are being used for, and how well the devices actually perform. As indicated in this report, passive alcohol sensors can be effective tools for traffic enforcement including such uses as creating a "perception of enforcement" to help deter drinking and driving, increasing a law enforcement officer's ability to detect alcohol if they have a cold or olfactory condition, or to assist in crash investigations .

Passive alcohol sensors have limitations. A passive alcohol sensor's sole function is to make a *qualitative* assessment of whether there is alcohol in the immediate vicinity of the driver – it cannot be used to measure blood alcohol content or determine impairment. Also, misleading readings may occur from the device's sensing of perfume, cologne, mouthwash, medicine or some other product that contains alcohol. In some cases, the officer will not be able to assume that the alcohol that has been detected is emanating from the subject rather than from another area , such as a spill on the floor. Furthermore, external environmental factors such as wind and cold temperatures, common phenomena in Wisconsin, can interfere with the functioning of the device. Finally, the technology is not absolutely foolproof and malfunctions are possible.

Public trust is important to law enforcement agencies. Several focus group members indicated the need to enhance the public's trust in law enforcement through the development of policies that ensure that citizens' rights are being upheld (see Chapter 2). This includes training officers in the proper use of the device as well as the legal and constitutional requirements that are part of any traffic stop. Training on the use of passive alcohol sensors appears to be an important indicator of the effectiveness of using the device.

Findings

- Passive alcohol sensors are designed to only provide a qualitative not quantitative assessment of the presence of alcohol.
- Although passive alcohol sensors are technically similar, they are manufactured in different shapes and sizes.
- Passive alcohol sensors have been used on a limited basis in Wisconsin to assist in traffic law enforcement.
- Passive alcohol sensors can be used by law enforcement and others for non-traffic applications.
- Existing case law and legal opinion have not identified a conflict between the correct use of passive alcohol sensors by law enforcement for traffic enforcement and the 4th Amendment to the U.S. Constitution.
- The use of passive alcohol sensors raises concerns about privacy rights and compliance with laws regulating searches and seizures.
- Many participants of the law enforcement and legal focus groups indicated that passive alcohol sensors should not be banned for use in traffic law

enforcement in Wisconsin. Some suggested that banning the devices would not serve a constructive purpose and the devices are another tool that should be made available for use in accordance with individual law enforcement agency and community needs.

- The public's perception of law enforcement use of passive alcohol sensors may provide a deterrent to impaired driving.
- The performance of passive alcohol sensors during testing was variable and even under laboratory conditions these devices did not approach the degree of dependability inherent in the qualitative devices that are already approved for use in Wisconsin. This lack of dependability was particularly evident during the testing of drinking subjects.
- Due to the nature of the passive alcohol sensors' sampling methods, the source of any detected alcohol cannot be known with complete certainty.
- The determination of "effectiveness" of passive alcohol sensors is measured by various standards, including:
  e) accuracy of each device as indicated by scientific testing;
  f) use of the devices as a public deterrence to impaired driving;
  g) cost of the devices for law enforcement in relation to the cost of other impaired driving detection tools;
  h) ease of implementation of the devices into law enforcement practices and policies.
- Passive alcohol sensors, like other technology, can be abused or used improperly by their operators resulting in information that could incorrectly characterize the drinking status of the driver/suspect.
- Research and data identified in Wisconsin studies do not indicate that the use of passive alcohol sensors influences the detection or conviction of alcohol-impaired drivers.
- Due to performance differences under varying environmental and weather conditions, there is a definite need for caution when considering the use of passive alcohol sensors for traffic law enforcement.